SUPREME COURT, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

No. 431

BOSS HOTELS COMPANY,
Petitioner,

vs.

CITY OF DES MOINES, IOWA, CHARLES ILES, GEORGE WHITMER, JENS GROTHE, WALLACE BUSS, GEORGE NAHAS, Members of the City Council of the City of Des Moines, Iowa, RIVER HILLS MOTOR INN COMPANY, F. W. WEITZ and NATIONAL MOTOR INN CORP.,
Respondents.

RESPONDENTS' BRIEF OPPOSING ISSUANCE OF WRIT OF CERTIORARI AND RESPONDENT CITY OF DES MOINES' REQUEST FOR DAMAGES FOR DELAY

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Respondents pray that this United States Supreme Court not issue a Writ of Certiorari to review the judgment of the Supreme Court of the State of Iowa entered in the above entitled case on April 15, 1966.

JURISDICTION

Petitioner's statement of grounds of jurisdiction on page 2 of the Petition for Writ of Certiorari refers to the Act of June 25, 1948, Chapter 646, §1, 62 Stat. 927. Petitioner's counsel has informed respondents that petitioner was referring rather to 62 Stat. 929. Petitioner's statement of the jurisdiction is in error because the state court judgment rests only upon interpretation of an Iowa Statute. The validity of a treaty or statute of the United States was not drawn in question, nor was the validity of a State statute drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, nor was any title, right, privilege or immunity specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States.

STATUTES, ORDINANCES AND REGULATIONS

The statutes, ordinances and regulations which the case involves and which petitioner has omitted are as follows:

1. Section 403.5(5) Code of Iowa, 1962, provides:

> "An urban renewal plan may be modified at any time: Provided, that if modified after the lease or sale by the municipality of real property in the urban renewal project area, such modification may be conditioned upon such approval of the owner, lessee or successor in interest as the municipality may deem advisable, and in any event such modification shall be subject to such rights at law or in equity as a lessee or purchaser, or his successor or successors in interest, may be entitled to assert."

2. Rule 56 (4) of the Supreme Court Rules states:

> "Where a petition for writ of certiorari has been filed, and there appears to be no ground for granting such a writ, the court may, in appropriate cases, adjudge to the respondent reasonable damages for his delay."

3. Paragraph F of the Urban Renewal Plan of the City of Des Moines, Iowa, provides:

> *"Change in the Approved Plan.*
>
> All major or significant amendments in the Urban Renewal Plan after initial passage by the City Council of Des Moines, will be subject to the same requirements and procedures by which this plan was initially adopted. The right to make minor modifications in said plan is reserved in the City of Des Moines, and such minor modifications will not be subject to the same requirements and procedures by which this plan was initially adopted." *Urban Renewal Plan of Des Moines, Urban Renewal Project No. 1, City of Des Moines, Iowa, p. 14.* (R 223)

QUESTIONS PRESENTED

1. Where (a) questions of interpretation of a Federal regulation and of a contract between a City and the Federal government are not presented to a State Court in any manner, (b) a state statute is the only item presented for interpretation to the State Court and the decision of the State Court is only on that statute, (c) reference to the Federal regulations and the Federal contract in the State Court decision is for the sole purpose of ascribing by parallel a precise meaning to the word "use" as it appears in state statutes, and (d) no other matters conferring jurisdiction under the Act of June 25, 1948, Chapter 646, §1, 62 Stat. 929, are presented to

the State Court, does the United States Supreme Court have jurisdiction to review?

2. Was the Iowa Court's decision, which was in substance that the word "use" as used in the Iowa statute referred to the actual use of the property in contradistinction to zoning height requirements, a federal question of substance such as to merit the attention of this Court?

3. Is a change in height restriction on Urban Renewal Property a change in "use," and, if so, does that change prevent sale of said property after concurrence of the Housing and Home Finance Agency of the United States in that sale?

4. Has a prospective redeveloper of Urban Renewal land itself proposing to build a structure in excess of three stories in height waived any right to complain of the award of said land to other redevelopers on the ground that those successful redevelopers proposed structures in excess of three stories in height, and is the unsuccessful redeveloper estopped from urging that said sale be prevented?

5. Does a dissatified competitor have a justiciable right to question the award of Urban Renewal land to others?

6. Does a dissatisfied competitor have standing to question the award of Urban Renewal land to others?

7. Is the respondent City of Des Moines, Iowa, entitled to damages for delay under Rule 56.4 of the Supreme Court Rules?

Petitioner in the last paragraph of Part C, page 3 of its Petition to this Court misstates the record in the case. The record is uncontradicted that petitioner itself had submitted a proposal on parcel T-3 for a motor hotel

varying in height from two to six stories while complaining of proposals of five and eight stories in height respectively by respondents, National Motor Inn Corp., hereinafter noted as "Downtowner," and River Hills Motor Inn Company, hereinafter noted as "Sheraton." Petitioner does properly set out the heighth of its proposed structure on page 8, paragraph 3 of its Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Respondents add to petitioner's Statement of the Case, the following:

Petitioner has a financial interest in and is the operator of two major hotels—The Hotel Fort Des Moines and Hotel Savery in downtown Des Moines—a few blocks from the urban renewal parcels in question. (R 60) Section 403.5(5) of the Code of Iowa, 1962, and the Urban Renewal Plan of the City of Des Moines, paragraph F, allowed modifications to be made in said Urban Renewal Plan at any time. The requirements and procedures for the initial adoption of the Urban Renewal Plan were inapplicable to minor modifications in said plan. The proposals of respondents "Sheraton" and "Downtowner" including structures of over the three story C-2 zoning height limitation then made applicable to the Urban Renewal Plan, were accepted subject to concurrence of the Housing and Home Finance Agency of the United States, hereinafter known as "H.H.F.A." (R 317) On the date of said conditional acceptance of respondents' "Sheraton" and "Downtowner" proposals, the City Council of the City of Des Moines adopted a minor modification to the Urban Renewal Plan, as revised, amended and modified, by removing the height restriction on T-1 and T-3. (R 318-319) Since that time, the H.H.F.A.

has concurred in the sale of said property to respondents "Sheraton". and "Downtowner."

Petitioner here also proposed a structure in excess of three stories on parcel T-3, but did not submit a proposal on parcel T-1.

Petitioner urges at page 11 of its petition that an allegation in its original petition stating that the proposals of respondents "Sheraton" and "Downtowner," did not comply with Section 403.8, Code of Iowa, 1962, raised the question as to whether the proposed sale met the Federal requirement of adherence to the Urban Renewal Plan. Respondents add that in no way did petitioner raise in the State Court the question which it here urges upon this Court. Plaintiff's original petition did allege violation of a federal statute but said allegation was voluntarily withdrawn by plaintiff in the pretrial conference. (R 75)

One element in this case relates solely to the filing of the petition for writ of certiorari where there appears to be no ground for granting the writ (Rule 56.4 of the Supreme Court rules). By stipulation in the record (R 68-69) it was agreed that the interest cost to the River Hills Urban Renewal Project in the City of Des Moines, Iowa, on money borrowed to finance such project is $26.71 per day as to parcel T-3 and $22.35 per day as to parcel T-1. The pertinency of such loss as it related to delay in consummating the subject sales as a result of this litigation is conceded by the stipulation. (R 68)

This Court does therefore have both the proper situation and the proper record to adjudge to the respondent, City of Des Moines, Iowa (the obligor of the subject moneys as the local public agency) damages equal to the said interest cost for the period of time from May 11,

1966 (the date of denial of rehearing in the Iowa Supreme Court, Page 11 of Petition) to date of denial of the writ or any subsequent denial of petition for rehearing thereon.

REASONS FOR NOT GRANTING THE WRIT

I.

The Judgment of the Iowa Supreme Court Rests upon a Non-Federal Ground.

The judgment of the Iowa Supreme Court rests solely upon a non-federal ground. No Federal questions as would give this Court jurisdiction under 62 Stat. 929 were presented to the Iowa Court. The Iowa Court stated in Division I of its opinion:

> "Plaintiff's first proposition for reversal here is 'Under section 403.8 of the Code of Iowa, 1962, purchasers of urban renewal real property "Shall be obligated to devote such real property only to the use specified in the urban renewal plan." Therefore, the bids of Sheraton [River Hills Motor Inn] and National Motor Inn may not be accepted by the City because such bids propose structures in excess of three stories or 45 feet in height—a use not permitted by the urban renewal plan.'"

The Iowa Court then determined that a change in height restrictions was not a change in use and that the provisions of Section 403.8 of the Code of Iowa, 1962, had been satisfied. The Court, in arriving at this determination, examined case law, the loan and grant contract between the City and the United States, the Urban Renewal Manual, the Urban Renewal Plan, and the Zoning Ordinance of the City of Des Moines. The Court then stated, in Division I:

> "Plaintiff does not urge any other statute or ordinance was violated in any respect here under its first proposition. Neither the proposals of defendants River

> Hills Motor Inn nor National Motor Inn nor the action of the City Council in modifying the Urban Renewal Plan to allow buildings of the height proposed violate section 403.8, Code, 1962, in the respect urged."

The Iowa Court in Division II discussed the second and last proposition urged to it by Boss Hotels Company, petitioner, now before this Court. The Iowa Court stated:

> "II. The second proposition urged by plaintiff here is that the proposed sales of parcels T-1 and T-3 were for less than their fair value, thus violating section 403.8, Code, 1962, in part as follows, 'Such real property * * * shall be sold * * * at no less than its fair value for uses in accordance with the urban renewal plan.' We do not find this proposition was pleaded below. Defendants so urge and plaintiff in reply does not challenge them. It is not properly before us."

Petitioner did not in the Court below draw the validity of a treaty or statute of the United States in question, or draw the validity of a state statute in question on the ground of it being repugnant to the Constitution, treaties or laws of the United States, nor was any title, right, privilege or immunity especially set up or claimed under the Constitution, treaties or statutes of or commission held or authority exercised under, the United States.

Petitioner submits to this Court that by urging noncompliance with Section 403.8 of the Code of Iowa, 1962, to the Iowa Court, it also impliedly raised the question as to whether the proposed sales satisfied any existing Federal requirements of adherence to the Urban Renewal Plan. Respondents here urge that the question as to whether the proposed sales met the Federal requirement of adherence to the Urban Renewal Plan, if there was such requirement, was not raised in any manner before the Iowa Court. This Court has always required that a question be raised before

the State Court before raising it here. This Court in the case of *Whitney* v. *California,* 274 U.S. 357, 47 S.Ct. 641, 71 L. Ed. 1095 (1926), cited with approval a number of earlier cases stating as follows:

> "It is not enough that there may be somewhere hidden in the record a question which, if it had been raised, would have been of a Federal nature. * * * and this necessarily excludes from our consideration a question sought to be raised for the first time by the assignments of error here,—not presented in or passed upon by the Court of Appeal . . ." 274 at 362.

II

The Question Here Raised by Petitioner Is Not a Federal Question of Substance.

The proposition petitioner here raised for the first time is a narrow one, (a) that a change in height restrictions on two urban renewal parcels designated for motor hotels which allowed motor hotels of a height in excess of the original height restriction to be erected on those parcels is a change in "use"; (b) that such a change in "use" breaches the contract between respondent City and the Federal government and fails to satisfy the alleged requirements of the Urban Renewal Manual that the land sold be devoted to the "uses" specified in the Urban Renewal Plan without modification.

Petitioner ignores the fact that the Iowa Statute, the Urban Renewal Plan of the City of Des Moines, Iowa, and the Federal regulations all allow the modification of the Urban Renewal Plan.

Petitioner cited no cases to the Iowa Supreme Court holding that a change in the height was a change in "use," thereby being in violation of Section 403.8 of the Code of Iowa, 1962. Neither has petitioner cited in its petition

to this Court a case which holds that a change in height is a change in "use." Petitioner does not explain why its question here raised should be of concern to this Court. Even (a) if petitioner could overcome its failure to urge violation of the Federal regulations and breach of the Federal contract to the Iowa Court, (b) if petitioner could overcome respondent's equitable defenses stemming in part from petitioner's submission of a proposal also higher than that the Urban Renewal Plan allowed unless modified, and (c) if petitioner could overcome all defenses of respondent, then it is respectfully submitted that petitioner has yet failed to submit any Federal questions of substance.

III.

The Decision Below Is Clearly Correct.

Petitioner has cited no cases in this matter holding that a change in height is a change in "use" and that such was then a violation of the Federal regulations, and a breach of respondent city's contract with the Federal government. The only cases cited in this matter uniformly hold a change in height is not a change in "use." See *Schueller* v. *Board of Adjustment*, 250 Iowa 706, 95 N.W.2d 731 (1959); *McJimsey* v. *Des Moines*, 231 Iowa 693, 2 N.W.2d 65 (1942).

Petitioner has cited no cases holding that which petitioner here urges. The uses of the Urban Renewal Plan remained the same before and after the modification which allowed a higher motor hotel to be constructed. The use, as stated in the original Urban Renewal Plan, at all times was "tourist commercial." (R 213, 215) This use, as was determined by the Iowa Supreme Court, remained constant. The Iowa Supreme Court found, in Division I of its opinion:

"The use refers to the activity carried on on the premises. This is not changed by a change in the height regulation or restriction."

Even if the word "uses" as used in the Urban Renewal Manual and the contract between the City and the Federal government is equated to "height restrictions" the acceptance of the City of respondents' "Downtowner's" and "Sheraton's" proposals was conditioned upon the H.H.F.A.'s concurrence (R 317) and said concurrence could not be given until the proposal satisfied the Urban Renewal Plan. (R 366) The plan was properly modified by the respondent City under its Urban Renewal powers as expressed in Section 403.5(5) of the Code of Iowa, 1962, and paragraph F of the Urban Renewal Plan (R 223) by which the city had the power to make minor modifications in the Urban Renewal Plan. This modification was made before the H.H.F.A. concurrence which satisfied the condition of the city's acceptance. Respondents' proposals met the plan in all respects at that time, and hence, the requirements of the Urban Renewal Manual and the contract between the City and the Federal government were satisfied.

Further, petitioner by submitting a proposal for a motor hotel in excess of three stories, had waived its rights and was estopped from complaining that the award to respondents "Sheraton" and "Downtowner" was improper because respondents' proposals were in excess of three stories. See *Callanan Road Improvement Co.* v. *U. S.*, 345 U.S. 507, 97 L. Ed. 1206 (1952); *Clifton Land Company* v. *City of Des Moines*, 144 Iowa 625, 123 N.W. 340 (1909).

Additionally it is submitted that respondent as a disappointed competitor in this matter had no standing to sue in this matter, See *Pittsburgh Hotels Association* v.

The Urban Redevelopment Authority of Pittsburgh, et. al., 202 F. Supp. 486, Aff'd 309 F.2d 186, Cert. den. 372 U.S. 916, 83 S. Ct. 730 (1962); *Taft Hotel Corporation* v. *Housing and Home Finance Agency,* 162 F. Supp. 538, Aff'd 262 F.2d 307 (1958), nor did petitioner have a justiciable right. *Rugo, Inc.* v. *Henson,* 148 Conn. 430, 171 A.2d 409 (1961).

DAMAGES

The supposed ground for granting the Writ in this cause set forth by the petitioner is so insubstantial that its purpose becomes apparent: The Petitioner is seeking a delay in the disposal of Urban Renewal land for purposes which would compete with its present hotel operations in Des Moines, Iowa. The respondent, City of Des Moines, in its capacity as the local public agency, is suffering damages at a daily rate of $49.06 in interest cost alone by reason of this delay. The record has no monetary figure on the real estate tax loss occasioned by this delay. The petition is frivolous. This case involves the power of the City of Des Moines to modify local ordinances to change a building height restriction. Any question that inheres therein is not a substantial Federal question. Moreover, petitioner did not even submit a proposal on parcel T-1 but nevertheless by filing its petition delayed its disposal. It is respectfully submitted the Court has before it a record on which it can base a judgment in favor of the respondent City of Des Moines, Iowa, for reasonable damages as Rule 56 (4) permits.

CONCLUSION

Petitioner for the first time in this case contends that the determination of whether a change in "height" is a change in "use" is a substantial Federal question.

This petition should be denied for the reasons hereinbefore set forth in this Brief that (a) the judgment of the Iowa Supreme Court rests upon a non-Federal ground, (b) the issue raised by petitioner is not a Federal question of substance, and (c) the decision of the Iowa Supreme Court is clearly correct.

Respectfully submitted,

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SUPPLEMENT TO CONCLUSION UNDER RULE 56.4 OF THE SUPREME COURT RULES

The respondent City of Des Moines, Iowa hereby respectfully prays this Court to adjudge damages against the petitioner in the sum of $49.06 per day for each day of the period commencing May 11, 1966 and ending on the date of denial of the Petition for Writ of Certiorari, or the date of denial of any subsequent petition for rehearing of such denial, whichever is later, all as provided by Rule 56.4 of the Supreme Court Rules.

Respectfully submitted,

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